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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CRAIG RICHARD CHANDLER Defendant and Appellant.	H040429 (Santa Clara County Super. Ct. No. C1223754)

In a second amended information, filed on July 31, 2013, during the trial in this case, the Santa Clara County District Attorney charged appellant Craig Richard Chandler with five counts of committing a lewd or lascivious act on a child under the age of 14 years, in violation of Penal Code section 288, subdivision (a).[1] Appellant was a teacher at a San Jose elementary school (hereafter the school). In the information, pursuant to section 667.61, subdivisions (b) and (e), the district attorney alleged that appellant had committed the offenses against multiple victims. In this case, it was against five different young girls.

On August 1, 2013, a jury convicted appellant on all five counts and found the multiple victim allegation to be true.

Subsequently, on November 22, 2013, the court sentenced appellant to five consecutive terms of 15 years to life. The court imposed statutory fines, fees, and

[1] All further statutory references are to the Penal Code unless otherwise indicated.

assessments, and ordered appellant to pay $14,197.50 in victim restitution. The court awarded appellant presentence credit of 785 days.

Appellant filed a timely notice of appeal on November 22, 2013.

On appeal, appellant claims that his trial counsel was ineffective in failing to properly cross-examine a critical prosecution witness, provide available exculpatory evidence, and produce the exculpatory evidence that he had promised to produce during his opening statement to the jury. In addition, appellant contends that the court improperly excluded several pieces of evidence, improperly prevented the defense from introducing an exhibit, and erred by allowing testimony that previously appellant had offered to massage the feet of a female teacher and had offered to photograph her feet. Appellant asserts that the cumulative impact of all the aforementioned errors denied him his right to due process. Finally, appellant requests that the abstract of judgment be amended to delete the references to "enhancements." For reasons that follow, we agree that the abstract of judgment needs to be modified, but as so modified we affirm the judgment.

Facts

Appellant taught a combined second and third grade class at an elementary school in San Jose. Appellant's classroom, No. 18, was at the very back of the school. Years earlier, the lower panes of the classroom windows in that part of the school had been replaced with painted boards. Classroom No. 18 had a door connecting it to an adjacent classroom but the connecting door did not have a lock on it. A playground was adjacent to the building housing classroom No. 18.

Count 2—Jane Doe I[2]

Jane I was born in March 2003. In 2011, she was in the third grade in appellant's combined second and third grade class. One day in October 2011, Jane I came home from school and told her mother that appellant asked her to go into the classroom, where he blindfolded her and rubbed something on her feet. Jane I's mother noticed a small white spot, resembling nasal mucous, on the front of Jane I's jacket. Jane I's mother went to the school, showed the stained jacket to the principal, and asked that Jane I be transferred to a different third grade class.

During the 2011/2012 school year, Lyn Vijayendran was a principal at the elementary school. In mid-October 2011, Jane I's mother came to school to report that Jane I had been alone with appellant, and that appellant had blindfolded her daughter and put something in her mouth. Jane I's mother requested that her daughter be transferred to a different classroom. Jane I's mother showed Vijayendran Jane I's hooded sweatshirt, which had a quarter-sized stain resembling saliva on the front. It did not appear to Vijayendran that it was a semen stain. Vijayendran spoke with Jane I and took contemporaneous notes of their conversation.

According to Vijayendran, Jane I told her that another student told Jane I that appellant needed her, so she went back to the classroom. Appellant got a blue blindfold and a blue and white blanket out of a basket. Then, appellant told Jane I to put on the blindfold and lie on the floor. Appellant put the blanket over her head and told her to take off her shoes. Jane I felt something "gooey" or "scratchy like a tongue" (but not a tongue), on the bottom of her feet for about 20 seconds. Jane I felt appellant moving. He told her to move her legs or open her legs—Jane I could not remember which—but she

[2] We refer to the victims in this case as Jane Doe I, II, III, IV, and V to protect their anonymity. For ease of reading we will refer to them as Jane I, Jane II, Jane III, Jane IV and Jane V.

never felt anything between her legs. Then, appellant lifted the blanket to her nose and said he was going to put something in her mouth. He put a "gooey" thing in her mouth and wiggled her body and head back and forth. Jane I felt some salty water in her mouth, some of which dripped on her hand and jacket. Jane I wiped her hand on her jeans. Appellant removed the blindfold and blanket. The bell rang and Jane I stood up. Appellant opened the door, went to the sink, got a damp paper towel, and cleaned up Jane I's pants, after which he put a "Wonka candy" in Jane I's mouth.

Vijayendran transferred Jane I to a different class the following day. Vijayendran did not report the matter to the police. Instead, she told appellant not to have students alone and blindfolded in the classroom with the door closed. Vijayendran acknowledged that Helen Keller's story was taught at Jane I's grade level. Teachers did not have to submit a lesson plan for approval, but they did have to teach to prevailing standards. Vijayendran went on maternity leave during the winter break of the 2011/2012 school year.

During the trial in July 2013, Jane I remembered few details of what had happened in 2011. She did remember her friend calling her in from recess. She remembered sitting in the classroom in a chair that did not have rollers that was near appellant's desk. She remembered that water got on her jacket. However, she forgot everything else that happened. The prosecutor and a reader read Jane I's May 21, 2012 preliminary hearing testimony, during which Jane I stated appellant put a round thing most of the way into her mouth and something gooey and salty came out of it. A recording of Jane I's interview with the police was played for the jury. In that interview, Jane I reported that appellant said, "Don't bite it" when the "gooey thing" was in her mouth.

Count 1—Jane Doe II

Jane II was born in November 2003. She was in the second grade in appellant's combined second and third grade class during the 2011/2012 school year. In the classroom, appellant played a game with the students in which he blindfolded them and

had them feel objects with their hands, feet, and legs and then guess what the object was. Appellant did a "taste game" in class in which he blindfolded students and had them guess what kind of candy they were given. Jane II volunteered for that game and said it was "sort of fun." However, about once a week appellant kept Jane II in the classroom during recess when all the other students were outside playing. At these times, the classroom door would be closed. Appellant would put Jane II in a chair with rollers and blindfold her; then, he put something "curvy" in her mouth. The curvy thing took up almost all of her mouth and she could not close her teeth on it. Jane II could not really describe it.[3] Appellant would put his hand behind her head, push her head back and forth, and tell her to move her tongue around. Then appellant would say, "Hold on" and go behind his desk and she would hear a sound "like a zipper." Sometimes appellant would give her candy afterwards. He gave her crackers, but she did not like them so she would spit them out.

According to Jane II's mother, Jane II always looked forward to going to school. However, just before the winter break in the 2011/2012 school year Jane II's attitude changed and she started dawdling and complaining she did not want to go to school. On January 9, 2012, Jane II refused to walk to school. When Jane II's mother asked her daughter what was wrong, Jane II said appellant was doing stuff to her; then, she started crying and said appellant had put something round in her mouth, which made her gag. Immediately upon hearing this, Jane II's mother concluded that appellant was putting his penis in her daughter's mouth. Jane II's mother said that she went "crazy" and started yelling. She drove to the school and repeated what Jane II told her to Lea Peery, the

[3] A recording of Jane II's interview with Detective Sean Pierce from the San Jose Police Department was played for the jury. In the interview, Jane II described the thing that appellant put in her mouth as "Kind of hard." However, it was not "hard like" a "can." When asked if it was "kind of soft" Jane II nodded her head. Jane II said the thing was bigger than the detective's finger, but smaller than a banana. She felt as if she was going to choke.

assistant principal at the school during 2011/2012 school year. Peery responded, "Oh, my God. Not again!" Jane II's mother asked what Peery meant. Peery said she had had a meeting with some parents concerning the same situation and they had resolved the matter.[4]

Jane II's mother felt the school was not adequately acting upon her daughter's complaint, so she called the police. The police came and briefly interviewed Jane II, then took her to a different location for a more detailed interview.

Detective Sean Pierce interviewed Jane II and her mother that same day—January 9, 2012. Later that day, Detective Pierce and other officers interviewed approximately 40 students at the school simultaneously in order to reduce the opportunities for witness contamination. Over a two-day period the officers interviewed a total of 77 students, including Jane I, who was interviewed on January 10, 2012.

On January 9, 2012, Detective Pierce met with appellant in the lobby of the San Jose Police Department and told him not to return to the school.

Count 5—Jane Doe III

Jane III was born in June 2002. She was in third grade in appellant's class in the 2010/2011 school year. Jane III's cousin Noemi G. was 13 years old when appellant was arrested in January 2012. Noemi saw daily articles and "TV" news stories regarding allegations of appellant's sexual misconduct with his students. Noemi started asking Jane III if appellant ever did anything to her. After repeatedly inquiring for about a week, Jane III asked Noemi if she would be arrested if she told her what appellant did to her. Noemi assured Jane III she would not get in trouble. Over the course of two conversations a week or so apart, Jane III revealed that on five or six or more occasions,

[4] When she testified, Peery denied that she responded, "Oh no, not again," to Jane II's mother. Peery asked Jane II's mother to go home and get Jane II. Jane II told Peery she had to stay in at recess two times, during which appellant blindfolded her and put a big, round thing in her mouth and made her move her tongue around.

appellant made her go into the classroom by herself at recess, covered her eyes, and put something in her mouth. Jane III said the object was hairy and "tasted like pee." Jane III said she was able to peek and see a little bit, and described what she saw as looking like a "guy's thing" or "weenie." Noemi asked Jane III to draw a picture of what she saw and Jane III drew an imaginary picture of what to Noemi resembled a penis.[5] After her second conversation with Jane III, Noemi called her aunt (Jane III's mother). Eventually, Naomi was interviewed by Detective Pierce.

Jane III testified that appellant's third grade class played a game in which a student sat in a chair in front of the whole class and appellant put something in the student's mouth and asked him or her to guess what it was. Jane III remembered tasting grape, strawberry, and coconut-tasting lollipops. The class played a game in which the students got on the floor in front of the whole class and had to feel things with their feet. Jane III remembered playing that game and feeling a marker and a water bottle.

However, on five or six occasions, appellant had Jane III go into the classroom by herself at recess.[6] Two or three of those times, appellant made her sit in a blue chair and he covered her eyes. Appellant first put a type of candy, such a lollipop, in her mouth, or he gave her sweet or salty liquids and asked her to taste them. Then appellant put something else in her mouth, which she could not identify. It was circular and she could only close her mouth a little bit. The thing was "squishy" and soft and slippery, and appellant told her to keep on licking it. A bad-tasting type of liquid came out of it, which she spit out. When Jane III played the tasting game in front of the class, liquid did not come out of the thing in her mouth. This made her feel as if something was wrong when she played the game with appellant alone.

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[5] Noemi described Jane III's use of a stick to draw an imaginary drawing on the sidewalk.

[6] On cross-examination Jane III said she put on the blindfold herself.

One time Jane III was able to see below the blindfold and she saw something circular, which she thought was a "weenie." She drew a picture of what she saw for the police, with the lines surrounding the circular thing representing hair. One time, after she took off her blindfold, Jane III saw appellant pulling up his pants and she heard a noise "like a zipper or something."

Two other times, appellant had Jane III do an exercise on her hands and knees. Her eyes were not covered these times, and appellant would be behind her, holding her feet. He pushed against her bottom with his head or a "bouncy ball"; then as Jane III looked between her legs she saw some water dripping onto the ground behind her.

Jane III was at a friend's house when she saw a report on the television with appellant's picture. She told her cousin Noemi what appellant had done to her and asked if she would get arrested.

Jane III's January 17, 2012 interview with the police was played for the jury. In general her trial testimony was consistent with what she told the interviewer.

Count 3—Jane Doe IV

Jane IV was born in November, 2003. She was in the third grade in appellant's combined second and third grade class. Appellant read a book to the class about a woman who could not see and who had to feel things to know what they were. Appellant had the class play a game in which the students were blindfolded and had to feel things to guess what they were.

During a lunch recess, the yard duty person came and told Jane IV to go to appellant's classroom, No. 18. When Jane IV got to the classroom, appellant closed the door behind her and blindfolded her. Jane IV sat in a chair and put her feet up on a student's table. Jane IV did not have her shoes on, only her socks. Appellant had her feel things with her feet. Jane IV did not remember how many times she did this, and she did not remember appellant putting anything in her mouth. However, Jane IV did remembered telling the police she felt a glue stick against her feet.

Jane IV's interview with the police was played for the jury. In the interview, Jane IV told the interviewer that appellant had her feel things with her feet while she was blindfolded and he told her that one of the things was a glue stick. Jane IV described the glue stick as hard and smooth and a "[l]ittle bumpy." Jane IV said that at first the glue stick was sticky—she could feel this because it was sticking to her socks. Jane IV said that she thought she remembered appellant telling her not to tell anybody.

Dr. Lynn Doe,[7] a psychological consultant retained for purposes of a civil suit that had been filed against the school, was called as a witness by the prosecution. The court limited her testimony to Jane IV's prior inconsistent statements. Dr. Lynn interviewed Jane IV at her home office on November 29, 2012. Jane IV became very upset and embarrassed and started crying when the doctor asked her about being a student in appellant's class. Jane IV said she had been alone in appellant's classroom five to 10 times and appellant blindfolded her about five times. When she was blindfolded, something "hard and gooey" was put into her mouth. She had to touch something hard and then there was "sticky stuff" in her mouth. Jane IV said that she was alone with appellant approximately 10 times; five times she was blindfolded. The doctor's notes reflected that Jane IV reported two episodes when she touched something hard and two episodes when something sticky was in her mouth; she was blindfolded during all these episodes. The doctor's notes did not contain any mention of Jane IV's feet.

Jane IV told Dr. Lynn that she hated school and never wanted to go back; that other children had made fun of her and said she had been raped. They called her a slut, but she did not know what that meant.

[7] The psychologist's name has been redacted from the record. When she was called as a witness she was referred to as Dr. Lynn Doe. For ease of reading we refer to her as Dr. Lynn.

Count 4—Jane Doe V

At the time of trial Jane V was 11 years old. She had had appellant as her third grade teacher during the 2010/2011 school year. Jane V said that on approximately 15 occasions during that school year, appellant kept her and a friend back at the morning recess when the other students went out to play. On these occasions, appellant would make her and her friend take off their shoes and socks and lie down on the floor on their stomachs, so the bottoms of their feet faced the ceiling. Appellant put soft fabric bags over their heads and rubbed something round, which he got from the supply cabinet, between Jane V's feet. Jane thought that the something might have been a glue stick or an eraser. Jane V's friend was with her every time this happened.

On about 10 occasions following the 15 involving the foot-touching, appellant kept Jane V in at recess and made her sit in a blue student chair, where he either blindfolded Jane V or had her put on a blindfold. Appellant put two things, which he said were candy, in her mouth. The first object felt and tasted like candy, but Jane V could not identify the second object, which was round, "kind of big," felt and tasted like skin, and was slippery. Although that object sometimes tasted a little like strawberry, it did not taste like any food she knew. When appellant put the second item in her mouth, he put his hand behind her head and pushed for about five minutes, so that both her head and the thing in her mouth moved back and forth. One time Jane V bit down on that object because she thought it was candy and appellant told her not to bite. Jane V wondered how appellant could know she bit down on the object if it was only candy. Sometimes Jane V heard "metal hitting together"; to Jane V it sounded like a belt. She heard footsteps and water running in the sink. The classroom door was always closed on these occasions.

More than half the time that Jane V had something put into her mouth her friend was there too. Afterwards, appellant gave Jane V a lollipop and sent her out to play.

After one session as Jane V and her friend were walking down the hallway, Jane V's friend told Jane V that she saw appellant pick up his belt from the desk.

One day, after a session where Jane V and her friend were alone with appellant, the entire class played a "taste" and "feel" game in which the students were blindfolded and had to guess what appellant put in their mouths. Appellant did not have the students feel anything with their feet. Jane V did not recall a class discussion regarding Helen Keller or a girl who could not see or hear.

The first adult Jane V told about what had happened was the police officer who came to the school; she never talked to Jane III about what had happened while she was in third grade.

Jane V's interview with an interviewer was played for the jury. Jane V recounted the events in which appellant rubbed things on her feet and her friend's feet. Jane V did not know what appellant used to rub her feet, but thought it might be "a body" part that appellant was holding, but she did not know which part. As to the thing that was placed in her mouth, Jane V did not know what it was, but described it as feeling "like . . . a gummy bear" but it was bigger than a gummy bear. Appellant kept pushing the thing into her mouth for about two minutes. Then appellant would go to the sink and "clean something." She heard "the handle squeak and then water ran down." Jane V described the thing as being long and said she could not close her mouth.

Other Events

On the morning of January 9, 2012, Armando Lara, who was the acting assistant principal at the school, was called to the office to assist Lea Peery in investigating a parent's complaint. The police were called that same day.

Assistant Principal Lara arrived before 6:00 a.m. the next day. Although school began at 8:30 a.m., appellant arrived at about 6:45 a.m., carrying one or more items in a plastic grocery bag, and went to his classroom. No other teachers were on campus that early. Lara and Dan Deguara from the school district office went to appellant's

classroom. The classroom door was locked, so they used the master key to enter. Appellant was standing near his desk and Deguara told him he needed to leave. Appellant asked if he could take his personal belongings; Deguara said yes. Appellant took some items, including cleaning supplies from the desk, shelves, and cabinets in the classroom. Appellant was escorted from the campus.

Forensic Investigation and Evidence

San Jose Police Officer Russell Chubon arrived at the school near 12:00 noon on January 10, 2012. He conducted a thorough search of classroom No. 18, but did not find any blindfolds. Officer Chubon seized two chairs, both with wheels. One was a chair near a horseshoe shaped table, marked SYO-01, and the other was a chair from appellant's desk, marked SYO-02. Both chairs had a thick plastic base with fabric-covered seats and backs.

Forensic biologist Kristin Cardosa used an alternate light source and detected areas of fluorescence of both chairs seized by Officer Chubon. Chair SYO-01 had multiple areas of fluorescing stains, only one of which tested positive for semen with a presumptive chemical test. Cardosa swabbed that stain for DNA, which revealed the presence of spermatozoa. She compared the DNA with a known sample of appellant's DNA (obtained from a cup in his classroom) and conclusively determined a white stain on SYO-01 contained appellant's sperm. The stain revealed only a single profile, and contained only semen, no epithelial cells.

Cardosa found five stains presumptively testing positive for semen on chair SYO-02. She tested one of those five stains for DNA and determined that the stain contained appellant's semen and sperm. Again, the stain contained only semen, no epithelial cells. The stain on SYO-01 was less than a quarter-inch wide by four to five inches long, and looped back on itself. The stain on SYO-02 was about the size of a nickel. Both stains appeared to have been directly deposited on the chairs, as opposed to

transfer stains, but the chairs would have had to have been flipped over to have received direct deposits of semen because they were on the bottom of each of the seats.

Other Incidents at the School

Mary Montgomery taught at the school during the 2011/2012 school year. Her classroom, No. 19, was adjacent to appellant's classroom. One day in the autumn semester of that school year, during one of the lunch periods, Montgomery heard someone knocking on appellant's classroom door. The knocking became incessant. She looked out her door and saw one of her former students named Chris, who was at the time in appellant's class, knocking on appellant's door. Montgomery asked where appellant was. Chris said he was in the classroom. Montgomery asked if the door was stuck. Chris pushed the door handle down but the door was locked. Moments later the door opened and appellant walked out by himself. His students were standing unsupervised in the area outside the classroom.

Hilda Keller taught kindergarten and first grade at the school between 2000 and 2005. She knew appellant as a fellow teacher, but not as a friend. One day, when Keller left her classroom door open, appellant entered her room, closed the door behind him, and stood in the corner of the room for about a minute. Keller asked appellant what was going on. Appellant started walking towards her and said he was taking a massage therapy class and asked to take pictures of her feet and give her a foot massage. Keller felt very uncomfortable, stood up, and tried to make light of the situation. She opened the door and appellant left the classroom. Keller found the incident very unusual and in the context of their relationship was concerned that appellant's request was sexually motivated.

Defense Evidence

Dorothy Catangay, who taught the third grade in classroom No. 16 at the school, testified that a door connecting classroom Nos. 16 and 18 had no lock and one could pass

through the door simply by turning the handle. Appellant often passed through the connecting door because it was a shortcut to the parking lot and school office.

A male student, Ly Doe, who was at the time of trial in fourth grade, testified that students played the tasting and feeling game in appellant's second grade class. Ly covered his eyes with his hands, not a blindfold, and he never was alone with appellant. The students played one game by tasting various food items appellant provided from a ziplock bag. Appellant told the students to chew the item and guess what it was. In another game, appellant had the students lie down on the carpet and feel things with their hands and feet. In yet another game, appellant would move the students' desks from the center of the room and a student would close his or her eyes and be directed by the other students toward appellant's hand.

Several former students described playing similar tasting and feeling games while blindfolded and seated or lying down in appellant's second or third grade classes. None of these students played the game alone in the classroom during recess. None of these students had something oblong-shaped put in his or her mouth that made them choke or which released a salty liquid or moved in and out.

Annie Doe, whose daughter was in appellant's third grade class, met appellant at a back-to-school night. Annie told appellant she was single and appellant said he had a two-year-old child and recently had separated from his wife. Appellant asked for Annie's phone number. Subsequently, they spoke on the phone. Annie trusted appellant as a teacher and as a parent and believed a serious relationship might develop with appellant.

About a month after they met, Annie and appellant went on a date. Afterwards, they returned to Annie's house, where they took off their clothes and kissed. They tried to have sex, but appellant was nervous and sweating and could not get an erection, so he left around 2:30 or 3:00 a.m. Annie continued calling and texting appellant for some time afterwards, but he did not respond.

Four to six months later, Annie attended a parent-teacher conference with appellant at the school. Her meeting was scheduled for 6:00 p.m. When she arrived appellant told her he wanted her appointment to be the last one of the day. A small dog was running around the classroom, but Annie did not know to whom the dog belonged. Annie sat in a student chair. After saying just a few words about her daughter's performance in school, appellant moved his chair close to hers so their knees were touching. Appellant put his arm around her and began kissing her. Someone tried to get in the classroom door. Annie got nervous and appellant said it was just the janitor. Appellant reassured her that the door was locked. Appellant began pulling Annie's leggings down. Annie resisted and tried pulling them back up because she was afraid the janitor would enter. Appellant turned her around, succeeded in pulling down her leggings, and put his penis in her vagina from behind. He ejaculated very quickly. Annie pulled her leggings back up and walked home, extremely upset and crying. The next day appellant sent her a text message saying how pleasurable it was with her, but she did not respond. Thereafter, appellant sent her an angry text message. She replied that she was busy and did not want to talk to him.

In January 2012 Annie took her daughter to the police for an interview. At that time, Annie told the police about what appellant had done to her. She said she was raped.

In January 2012, Jane III's mother saw appellant's photograph in news stories reporting the allegations that appellant had molested some of his students. Later, she learned appellant had been her daughter's third grade teacher. Jane III's mother began asking her daughter questions about whether appellant ever did anything to her. Repeatedly, her daughter denied that appellant ever did anything and said he gave her lollipops.

Appellant called a licensed clinical psychologist, whom the court recognized as an expert in child sexual abuse and forensic interviewing techniques, to discredit the police investigation in this case. He catalogued all the inconsistencies in all the girls' interviews

and outlined several of these in his testimony. Except for Jane III's statements, the psychologist found the girls' statements to be insufficiently detailed and "impoverished narratives." He blamed this on poor interviewing techniques and deviations from standard interviewing protocols. Moreover, he said that several of the girls were subject to outside contamination by prior reports. However, the psychologist could not state that the girls' allegations were not true, and acknowledged that most allegations of child sexual abuse are true. On cross-examination, he recognized the many consistencies between the girls' reports and conceded that several of his perceived inconsistencies were not truly inconsistent. He admitted that he had been paid about $20,000 for his services.

The parties stipulated that civil suits against appellant and the school district seeking monetary damages had been filed on behalf of three of the victims. The lawsuits were filed after the children gave their statements to the police and/or after they had previously testified in court.

The jury deliberated for less than six hours before returning the verdicts.[8]

Discussion

Alleged Ineffective Assistance of Counsel[9]

Since appellant makes several claims that his counsel was ineffective, we set forth the pertinent law regarding his claims.

A criminal defendant has a right to the assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685 (*Strickland*).) This right "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 (*Ledesma*).) "To establish entitlement to relief for

[8] The jury was not deliberating all this time because they did ask for clarification about the multiple victim allegations and were brought back into the courtroom to receive that clarification.

[9] Appellant has filed a supplemental opening brief in which he makes additional arguments on most of his issues. Appellant's claim of ineffective assistance of counsel appears to be substantially the same as his argument raised in his opening brief.

ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings. [Citations.]" (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, at p. 694.)

"When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

"In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny . . ." and must "view and assess the reasonableness of counsel's acts or omissions . . . *under the circumstances as they stood at the time that counsel acted or failed to act.*" (*Ledesma, supra*, 43 Cal.3d at p. 216, italics added.) Although deference is not abdication (*id*. at p. 217), courts should not "second-guess" reasonable, if difficult, tactical decisions in the harsh light of hindsight. (*People v. Kelly* (1992) 1 Cal.4th 495, 522-523.)

"In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.)

Failing to Elicit Testimony that was Elicited at the Preliminary Hearing

Background

Appellant points out that the prosecutor's theory of the case was that he blindfolded the five victims and, unbeknownst to them, made them orally copulate him. He asserts, however, that since none of the five victims actually saw what he was doing while they were blindfolded, the most crucial, objective prosecution witness was

Cardosa, the forensic biologist, who unequivocally testified that she found stains containing appellant's sperm and DNA on two chairs from the classroom. In essence, appellant claims that testimony that was adduced by his counsel at the preliminary hearing was essential to his defense and his trial counsel was ineffective in not bringing out this evidence at trial.

Preliminary Hearing Testimony

Defense counsel Steven Clark cross-examined Cardosa during appellant's preliminary hearing. Cardosa testified that she had analyzed DNA in more than one hundred sexual assault cases, many of which involved oral copulation. Cardosa did not find any DNA in this case other than that belonging to appellant. Cardosa explained that because epithelial cells are more fragile than sperm cells, epithelial cells break open during the DNA testing process, resulting in epithelial fractions. Cardosa stated that "in this case, the epithelial fraction contained the same profile as the sperm cell fraction," which was associated with appellant. Cardosa detected no other DNA.

Thereafter, Clark elicited testimony from Cardosa that human adults and children have epithelial cells in their mouths, and had it been present in the stains on the chairs, Cardosa would have seen the DNA of someone other than appellant. Clark returned to this subject and elicited from Cardosa that the reason DNA sample swabs are obtained from the mouth is the abundance of epithelial cells. Cardosa testified that epithelial cells in the mouth are easily transferred to another object and can be transferred in multiple ways. Cardosa said she would expect to find the epithelial cells from a female's mouth transferred onto a man's penis during oral copulation. Further, she would expect to find the epithelial cells from the female's mouth in a sample if the man touched his penis after oral copulation and there was ejaculate on his penis. Moreover, if the male ejaculated into the female's mouth and the female then spit out that semen, Cardosa would expect to find a mixture of the female's saliva in the sample containing the male's semen.

Clark elicited from Cardosa that a semen stain was found "on the underside of the seat portion" of chair SYO-01. Clark asked if it was possible for someone with semen on his or her hand while moving a chair to transfer the semen to the chair. Cardosa responded, "Yes, it's a possibility." Clark then asked if Cardosa thought that had happened, or whether she knew. Cardosa responded, "It is hard to determine based on the pattern of the stain." Later, Clark asked Cardosa whether the stain on SYO-01 was "consistent with what's commonly known as a transfer stain." Cardosa answered, "Based on the shape of the stain, I cannot tell whether it's a transfer. You mean a secondary transfer from something else?" When Clark responded, "Yes," Cardosa replied, "Based on the stain, I can't determiner [*sic*] that." Cardosa continued, "It looks to be a straight stain from a straight liquid, but whether it was just deposited on there or wiped from something else, if it was a liquid transferred, it could be [a] transfer."

Trial Testimony

Defense counsel Brian Madden began his cross-examination of Cardosa at trial by questioning about the locations and sizes of the semen stains on the two chairs. Then he elicited testimony that she "did not test for saliva." She agreed that saliva contains epithelial cells, and when she was looking for spermatozoa she did look for epithelial cells; however, she found no "intact epithelial cells." Cardosa found only one body fluid—semen—in both of the stains tested. Cardosa found a small amount of semen on the underside of chair SYO-01, unmixed with any other body fluid or DNA, and found a small amount of semen on the left side of chair SYO-02, unmixed with any other body fluid or DNA.

After reaffirming that the small amounts of semen found on chairs SYO-01 and SYO-02 were unmixed with any other body fluid, Madden proposed to Cardosa the following hypothetical: "A man and a woman have sex in a room containing the two chairs, SYO-01 and SYO-02. Immediately afterward, some semen gets onto the hands of the man, and the man then moves both of these chairs, transferring the semen on his hand

to the chairs. [¶] Is that scenario a reasonable explanation for the finding that you made here?" Cardosa replied, "Based on the appearance of the stains, they don't appear to be transfer stains. They appear to be directly deposited onto the chairs." Madden re-asked the question: "They don't appear to be transfer stains?" Cardosa reaffirmed her previous answer: "They don't." Madden questioned, "Why not?"; Cardosa replied, "They don't appear to be smeared or in any kind of way disturbed. They appear to be just a pure liquid placed on the chairs."

During her opening argument, the prosecutor made the following observation: "And Mr. Madden asked Kristin Cardosa, remember the DNA expert, and said, Ms. Cardosa, I would like to give you a hypothetical. Let's assume that Mr. Chandler had consensual sex in a classroom with an adult woman and touched himself afterwards, then somehow put his hands on the chairs, move[d] these chairs around, would that explain the semen that was on the chairs? No. Well, why not? Because these aren't transfer stains. This isn't like she described a ketchup packet, where you smear your finger, you get a smear. It's called a transfer stain. It's something decidedly different than what you could view with the naked eye on these chairs, which are drops. She called them direct deposits."

Madden presented his closing argument without mentioning the DNA evidence, after which the court took the afternoon recess. Immediately following the afternoon recess, the court allowed Madden to reopen his argument, and he apologized for neglecting to cover the subject of the DNA. Madden started by telling the jury, "The two stains on these two chairs contain semen, no other bodily fluid, and it's Mr. Chandler's semen." Madden continued, "I disagree with Ms. Filo concerning Ms. Cardosa. Ms. Cardosa said that the one particular stain did not appear to be a transfer stain, but scientists would never make an absolute statement that it wasn't a transfer stain. She said it doesn't appear to be because there were droplets." Madden explained that "[t]he most important part of her analysis, however, has less to do with the transfer stain than the fact

[that] there was no saliva found in either stain. What that means is very clear, and it is this, that semen was never in the mouth of any child. Otherwise, there would be saliva in that stain—in those stains, and it's not there." At that point, the prosecutor objected that Madden's argument misstated the evidence and the parties approached the bench for a discussion.

Upon returning from the bench conference, Madden continued, "Let me restate that, ladies and gentlemen. There is no mixture of other DNA in that stain. There are no other epithelial cells saliva from—." Again, the prosecutor again objected, and the court struck Madden's last comment. At that point, Madden said no more.

During rebuttal argument, the prosecutor stated, "There is no evidence in this record at all that the crime laboratory could test for saliva. No evidence in the record at all. I will tell you what is in the record, that Craig Chandler's semen is found on one spot on SYO-01, confirmed on one spot on SYO-02, and presumptively confirmed on four other spots on that chair."

In essence, appellant's first claim of ineffective assistance of counsel is based on his assertion that Madden should have elicited the testimony from Cardosa at trial that his former defense counsel Clark elicited at the preliminary hearing concerning the semen stains on the chairs. He claims that Madden failed to elicit this available evidence and instead presented a garbled and wholly ineffective argument based on his inadequate cross-examination.

"[N]ormally the decision to what extent and how to cross-examine witnesses comes within the wide range of tactical decisions competent counsel must make. [Citation.]" (*People v. Cleveland* (2004) 32 Cal.4th 704, 746; *People v. McDermott* (2002) 28 Cal.4th 946, 993 [manner of cross-examination is matter within counsel's discretion and rarely implicates ineffective assistance of counsel].)

"[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." (*Harrington v. Richter* (2011) 562 U.S. 86, 111.)

The problem with appellant's ineffective assistance of counsel claim is his assertion that the DNA evidence adduced at the preliminary hearing was crucial to his defense. First, appellant overstates the importance of the DNA evidence. Certainly, if appellant had ejaculated into the mouth of one of his students and that student had spit out the ejaculate onto a chair and it dried leaving a stain, one would expect to find a mixture of DNA in any stain that was on the chair. However, there was absolutely no evidence presented that one of the victims spit out ejaculate onto one or two of the chairs that were examined.

The DNA analysis showed only that at some point appellant had ejaculated in the classroom. We can only speculate at what time and under what circumstances that happened. Without any evidence that one of the children spit out ejaculate onto one or both of the chairs, one reasonable inference to be drawn from the evidence of the presence of the semen stains is that they were completely unrelated to any of the events involving the children. Another reasonable inference to be drawn is that appellant was wearing a condom and the ejaculate from inside the condom, which would not have contained epithelial cells from the girls, dripped onto one or more of the chairs as appellant removed it.[10]

Moreover, the People's case did not rest on the assumption that the stains that were tested could be connected with any particular incident. The People's case was based on the testimony of five children who claimed that they had been subjected to

[10] We base this conclusion on Jane V's testimony that one of the things appellant put in her mouth was round, "kind of big," felt and tasted like skin, was slippery and sometimes tasted a little like strawberry.

unlawful touching—none of which involved them dripping or spitting semen onto a chair.

There was little to be gained if Madden had brought out to the jury anything more about the semen stain analysis than he already had done. Counsel could reasonably have concluded that in the absence of any testimony by the victims that they spit out ejaculate onto one or two of the chairs, there was little point in pursuing the DNA evidence further. That is, since the jury knew that no DNA was found in the semen stains that belonged to anyone else, and that many of the incidents lacked evidence regarding the spitting or dripping of semen, they had no reason to give much weight to the presence of the semen stains, other than to wonder what semen stains were doing there in the first place.

In sum, we find that the record supports the conclusion that Madden made a reasonable tactical decision to limit his cross-examination of Cardosa.

In the alternative, appellant argues that Madden was ineffective because he did not, either through cross-examination or through any other means, draw out the fact that Cardosa had testified at the preliminary hearing that she could not determine if one of the stains was a transfer stain. In other words, Madden failed to impeach Cardosa's testimony with her prior testimony allowing for the possibility of a transfer stain.

Again, we find that the record supports the conclusion that Madden made a reasonable tactical decision to limit his cross-examination of Cardosa.

Whether the one stain was a transfer stain or directly deposited stain was immaterial. The jury knew that appellant's DNA was the only DNA found in all the stains, and there was no evidence as to the circumstances that ultimately led to the deposit of the stains. Even if the jury knew Cardosa had stated previously that one could have been a transfer stain, there was no evidence to support the speculation that after appellant had sex with Annie Doe, he placed semen on his hand and then touched the underside of a chair without wiping or rinsing his hand. Appellant did not testify, and Annie Doe testified that during their encounter in the classroom appellant ejaculated inside of her.

There was nothing to be gained by bringing out the evidence that at the preliminary hearing Cardosa had stated she could not determine if one semen stain was a transfer stain.

Furthermore, even if the jurors had learned that Cardosa had previously stated that one stain could have been a transfer stain, they would not have known anything more than they already knew about the circumstances under which all the stains were placed on the chairs. They certainly would not have known anything that would have impeached the children's statements. Whether one stain was a transfer stain or had been directly deposited had nothing to do with the children's testimony. Madden could reasonably have concluded that there was little or nothing to be gained by pursuing this line of inquiry further.

Even if we were to assume for the sake of argument that Madden's performance was deficient in this regard, appellant does not make a sufficient showing of error to prevail on appeal. The most damaging evidence against appellant was the testimony of five young girls. The girls described various types of unlawful touching involving substantially similar conduct. The only reasonable and rational conclusion to be drawn from the testimony of the girls was that appellant had placed his penis in each girl's mouth and then had them unwittingly orally copulate him.[11]

In sum, given the strength of the prosecution's evidence, it is not reasonably probable that a more favorable determination would have resulted in the absence of counsel's alleged failings.

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[11] We recognize that Jane IV testified that appellant placed something against only her foot and never put something in her mouth. However, to some extent this testimony was impeached by Dr. Lynn's testimony that Jane IV had told her that on five occasions appellant put something "hard and gooey" in her mouth.

Failure to Present Evidence Promised by Defense Counsel during his Opening Statement

Background

After informing the jurors that he wanted to give them "an overview," Madden continued his opening statement as follows. "Craig's wife was also a grade school teacher, but she taught first and second grade. Craig was a very good teacher. He was a popular teacher. Got along, not only well with his students who really liked him because of the way he taught. There were lots of games that were played in his teaching. But it's been a long time since I have been in the second or third grade, as you could tell, but obviously children at that age learned many times by playing games, by doing things, by experiments, by demonstration. That's a very important thing to remember in this case. [¶] Early in his teaching career at [the school], Craig had an experience where he witnessed two of his students essentially bullying a special needs child. Bully might be too strong a word, but making fun of them. This bothered Craig, as it would bother any adult, but especially bothered Craig because Craig is dyslexic. Craig knows the experience of being made fun of, made feel to be—made to feel less than, made to feel stupid. So he really decided that he was going to try to do something about this, and so he came up with a plan to teach about Helen Keller, which you all know is the famous woman who was blind and deaf and came to teach millions of people at how to overcome her disabilities. [¶] The Helen Keller lesson plan is a completely valid mainstream story or lesson to teach to children of this age. That will be confirmed by either Ms. Vijayendran, one of the principals at one time at [the school], or Ms. Perry [*sic*], another principal at a later time. She actually was the principal after Ms. Vijayendran left for maternity leave. [¶] So he decided to create this lesson plan, and the idea taken from the Helen Keller book was to deprive children of their sight and have them engage in activity that involved tasting and identifying objects in their mouth and feeling and identifying objects that were touched on either their hands or their feet. And the object in both instances was to identify the object, and that's what happened in this case. It

happened again and again and again. And, in fact, it happened for almost the entire time Craig Chandler was teaching at [the school]."

Appellant contends that despite Madden's promises, "virtually none of the evidence predicted in his opening statement was presented to the jury. There was no evidence appellant was a very good teacher and/or that he was a popular teacher. Madden presented absolutely no evidence regarding appellant's dyslexia or the incidents involving the bullied or harassed students, which purportedly motivated him to develop the 'Helen Keller lesson plan.' While counsel promised [that] one of the principals would confirm that appellant's Helen Keller lesson plan—i.e., a lesson plan in which the student is blindfolded and asked to taste or feel something—was a 'completely valid mainstream story or lesson to teach to children at this age,' neither of the two principals testified to that."

Appellant points out that during his cross-examination of Vijayendran, Madden changed subjects and said he wanted to ask the principal about the "Helen Keller lesson plan." Then he asked, "Is the Helen Keller story an appropriate story to be telling second- or third-graders?" Vijayendran responded, "Yes." Madden continued, "Why is it an appropriate story?" The principal replied, "It's a commonly used story in that grade level." Counsel then elicited from Vijayendran that there was nothing unusual about a lesson plan that involves the Helen Keller story. Vijayendran stated that teachers at the school were not required to submit lesson plans to the administration.

Appellant argues that Vijayendran's testimony simply confirmed that it was appropriate to tell second and third graders the story of Helen Keller, and it would not be unusual to develop a lesson plan based on that story. Appellant contends, however, that this testimony was a long way from evidence that the school administration considered it appropriate to blindfold students and put objects in a student's mouth or rub objects on a student's body, as indicated in counsel's opening statement. Further, ultimately, Vijayendran testified that after Jane I reported the blindfold incidents in October 2011,

the principal expressly admonished appellant not to have blindfolded students alone in his classroom with the door closed.

Appellant acknowledges that the failure to present evidence promised in an opening statement is not necessarily ineffective assistance and can be a reasonable tactical decision. "Whether the failure to produce a promised witness amounts to ineffective assistance of counsel is a fact-based determination that must be assessed on a case-by-case basis. [Citation.] Forgoing the presentation of testimony or evidence promised in an opening statement can be a reasonable tactical decision, depending on the circumstances of the case. [Citations.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 955.)

On the record in this case, even if we were to conclude Madden's failure to present promised witnesses and testimony had no tactical justification and fell below the normal range of competency, we would find such error nonprejudicial. (*Ledesma, supra*, 43 Cal.3d at pp. 216-218.) The defense rested the guilt phase case two weeks after Madden delivered his opening statement. Given the strength of the evidence against appellant on all charged counts, we conclude that counsel's failure to present the witness testimony referred to in the opening statement did not prejudice the guilty verdicts. (*Ibid*.)

The jury heard evidence that learning about Helen Keller would be appropriate for second or third graders, and that there would be nothing unusual about teaching them about her. In addition, from appellant's own witnesses the jury knew that students would, in front of the class as a whole, be blindfolded and asked to identify objects that they touched or tasted. Whether the jury knew that this was part of a Helen Keller lesson plan developed by a good teacher, who had previously witnessed students making fun of a disabled student, was simply irrelevant.

The blindfolding of students followed by non-sexual conduct that was part of a regular class session was not the basis for appellant's convictions. The basis for the convictions was the conduct when appellant was alone with students, which could not reasonably be viewed as part of a legitimate lesson plan by a diligent teacher who was

simply overly enthusiastic about ensuring that his students would have empathy for disabled students.

Whether appellant was otherwise a good teacher, or whether he might have seen the incident counsel described, was irrelevant and would not have rebutted the evidence describing appellant's actions when the children were alone and were blindfolded. That evidence could not reasonably be explained away as part of a Helen Keller lesson plan. The core evidence that Madden stated would be elicited was in fact elicited, even if all the immaterial aspects to that evidence were not elicited.

Thus, any failure to produce evidence to support statements made by Madden did not leave a gap in the defense that the prosecution exploited to appellant's detriment. Appellant's core evidence was presented to the jury. Since, evidently, the jury concluded that the circumstances of the unlawful touching that the children described were to gratify appellant's lust, whether he was or was not a good teacher, and whether he had seen the incident counsel described, would not reasonably have affected the jury's verdict.

Exclusion of Defense Evidence

I. *Appellant's Explanation for his Behavior with the Children to Vijayendran*

Background

In limine, the prosecutor sought to introduce evidence that after Jane I's mother complained about appellant in October 2011, Vijayendran told him not to have children alone in the classroom. The prosecutor explained that "[w]e know a lot more about these conversations" because Vijayendran had been prosecuted for, and ultimately was convicted by a jury of, failing to report an incident of suspected child abuse. Madden clarified that at her trial Vijayendran had testified that she specifically advised appellant he was not to have children in his classroom with the doors closed with the children blindfolded, while putting things in a student's mouth. The prosecutor moved to exclude from evidence appellant's entire explanation as to why he was alone with a child in the classroom.

Madden responded by explaining that Vijayendran had testified that there was a lengthy conversation surrounding her admonition to appellant, during which appellant discussed "exactly what he did on the incident involving [Jane I], why he did it, what the purpose was. And it was at the end of that conversation" that Vijayendran stated "she did not feel" that what appellant did "was inappropriate in the sense of being sexual. She did not see any sexual connection whatsoever. She put [*sic*] that it was inappropriate in the sense of putting something in a child's mouth while blindfolded alone, and she thought that that was inappropriate, but she didn't see that as sexual." Madden explained that during that conversation appellant asked that he be able to continue with and complete the lesson, insofar as it taught empathy for disabled children, but that he would modify the lesson plan and show her the new plan in the next day or two. Madden asked that pursuant to Evidence Code section 356 he be allowed to introduce the entire discussion in order to place Vijayendran's statement in context. Ultimately, the court allowed the prosecutor to introduce what the court believed was the only relevant statement—Vijayendran's admonition to appellant not to be alone with students—and excluded from evidence any of appellant's statements explaining his actions. The court warned Madden that if he attempted to introduce any of appellant's statements, the court would sustain a prosecution objection.

During the trial, the prosecutor asked Vijayendran if, after she had the conversation with Jane I, she told appellant he was not to have students in his classroom alone, particularly blindfolded, with the door closed. Vijayendran responded, "I told him he was not to have students in his classroom alone with the door closed[,] blindfolded. And I told him if he had students in his room alone doing work—I highly recommended he not have students in his room alone, but that if he did, that they would be sitting at a desk working and the door should be open."

Appellant argues that the trial court improperly excluded the evidence of his explanation in response to Vijayendran's instruction that he was not allowed to have students in his classroom alone while blindfolded with the door closed.

Evidence Code section 356 provides in pertinent part, "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party . . . ."

Appellant maintains that because the prosecutor was allowed to introduce evidence that Vijayendran told appellant not to be behind closed doors with blindfolded children, he was entitled pursuant to Evidence Code section 356 to place that statement in the proper context of the greater conversation.

A trial court's determination of whether evidence is admissible under Evidence Code section 356 is reviewed for abuse of discretion. (See *People v. Pride* (1992) 3 Cal.4th 195, 235.)

" ' "In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. 'In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with,* the admission or declaration in evidence. . . .' [Citation.]" ' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 334-335.)

Nevertheless, "[b]y its terms [Evidence Code] section 356 allows further inquiry into otherwise inadmissible matter only, (1) *where it relates to the same subject,* and (2) it is necessary to make the already introduced conversation *understood*. Thus it has been held: the court must exclude such additional evidence if not relevant to the conversation already in evidence." (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192-193.) Thus, the rule that where part of a conversation has been shown in testimony the remainder of that conversation may be brought out by the opposing party is

necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items that have been introduced. (*Witt v. Jackson* (1961) 57 Cal.2d 57, 66-67.)

Appellant's explanation of what he had been doing in the classroom was simply irrelevant; it was not needed to make Vijayendran's statements to appellant understood. Excluding appellant's explanation of what he was doing in the classroom did not result in a misleading impression of what Vijayendran was intended to convey or did convey.

In sum, the trial court did not abuse its discretion in excluding appellant's explanation of what he was doing in the classroom after Vijayendran told him not to be alone with a student, while blindfolded, with the classroom door closed.

In his supplemental opening brief, appellant contends that the court's ruling deprived him of his federal constitutional right to present a defense. The People contend appellant forfeited this claim of error by failing to object at trial. We disagree.

As a general rule, where no objection is made on a particular constitutional ground, the defendant forfeits his claim of error on such ground for the purpose of appellate review. (See, e.g., *People v. Waidla* (2000) 22 Cal.4th 690, 718, fn. 4; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1253; *People v. Marshall* (1996) 13 Cal.4th 799, 830-831; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1155 (*Rodrigues*); *People v. Mitcham* (1992) 1 Cal.4th 1027, 1044.) An exception to forfeiture exists, however, where "it appears that either the appellate claim is the kind that required no trial court action to preserve it, or the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as each was wrong on grounds actually presented to that court, had the additional *legal consequence* of violating the Constitution." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 990, fn. 5 (*Lewis and Oliver*).) To that extent, appellant's new constitutional argument is not forfeited on appeal. (*Ibid.*)

Here, appellant raises no new or different factual or legal theories in connection with his constitutional claim. Rather, his position simply is that the trial court's ruling had the additional *legal consequence* of violating the Constitution. Nonetheless, "rejection on the merits of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases . . . ." (*Lewis and Oliver, supra,* 39 Cal.4th at p. 990, fn. 5.)

Without doubt, a defendant has the general right to offer a defense through the testimony of his or her witnesses. (*Washington v. Texas* (1967) 388 U.S. 14, 19.) However, generally, application of the ordinary rules of evidence does not infringe on a defendant's right to present a defense. (E.g., *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103; see *Taylor v. Illinois* (1988) 484 U.S. 400, 410, [the accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence].)

Since we have concluded that the trial court did not abuse its discretion in excluding appellant's statements to Vijayendran, there is no error on which to base appellant's constitutional claim. (*People v. Roybal* (1998) 19 Cal.4th 481, 506, fn. 2 (*Roybal*).)

II. *Vijayendran's Typewritten Notes*

Vijayendran testified on direct examination that she took contemporaneous notes while talking with Jane I on, or shortly after, October 14, 2011. According to Vijayendran, the handwritten notes contained only about one-third of what they discussed. The prosecutor introduced Vijayendran's handwritten notes, which were both read to the jury and admitted into evidence, as People's exhibit No. 3. Among other things, Vijayendran wrote that Jane I reported that appellant said he was going to put something in her mouth, and then Jane I said " 'he put the gooey something in my mouth.' "

At trial in mid-July 2013, Vijayendran testified that she did not "recall the exact details of the conversation at this point." On cross-examination, Madden marked as exhibit C typewritten notes, which Vijayendran prepared about three months later in January 2012, and which purported to document her conversation with Jane I. Vijayendran testified that her handwritten notes reflected about one-third of her discussion with Jane I. Vijayendran described her typewritten notes as "a different set of notes," which were "done later, so they were done more from memory, but they are more detailed." She would not say the typewritten notes were more accurate than the handwritten notes. Vijayendran described the typewritten notes as "expanded from my memory compared with the handwritten notes, which were being done while I was talking to the child." She testified that she added details in her typewritten notes based upon her reflection upon the handwritten notes. Vijayendran had her typewritten notes in front of her for reference during cross-examination by Madden.

Madden ascertained that Vijayendran testified in a legal proceeding relating to this matter in October or November 2012. Madden produced, though did not introduce, the transcript from that testimony. Madden asked Vijayendran whether Jane I talked about the "vessel" from which the drink came. Vijayendran replied, "I don't remember that clearly, what she said, except that she was describing gooey," and she used "the word 'gooey.' " Madden asked Vijayendran to review her testimony from the prior legal proceeding; then he asked whether she remembered Jane I discussing a bottle being gooey. Vijayendran responded that she remembered Jane I using the word " 'gooey,' but the rest of the conversation at that point is not that clear." The court then asked Vijayendran whether it would help to refresh her memory if she reviewed the transcript of her prior testimony. Vijayendran replied, "No."

On redirect, Vijayendran explained that she prepared the typewritten notes after appellant was arrested in January 2012, when the school district asked her to prepare an account of what happened. She clarified that by the time of appellant's trial, she did not

have an independent recollection of some matters stated in her typewritten notes: "I think I have an independent recollection of the general outline of how things happened, but when it comes to specific words, things like that, I may not have such a clear memory." Vijayendran could not specify whether she had prepared her typewritten notes based on her recollection alone or whether she had her handwritten notes available for reference. She prepared the typewritten notes while at home on maternity leave.

Later, citing *People v. Cowan* (2010) 50 Cal.4th 401 (*Cowan*), Madden moved to read into evidence the redacted contents of Vijayendran's typewritten notes, pursuant to Evidence Code section 1237. He explained that the issue was the portion of Vijayendran's typewritten notes following Jane I's description of appellant putting something "gooey" on her feet and leg. Madden read from the notes as follows. "Mr. Chandler was next to her. Mr. Chandler lifted the blanket up to about her nose and then put something in her mouth and made her drink something. She explained the drink as salty and that the bottle was gooey. I asked her if she felt the same as what was on her foot, and she said no. It felt different, but also gooey. [Jane I] said some of the drink fell out of her mouth because she was lying down and it got onto her jacket."

Madden argued that because Vijayendran could not remember Jane I stating the drink came from a gooey bottle, her typewritten notes were admissible both as a prior inconsistent statement and a past recollection recorded; therefore, her more complete typewritten notes should be read into the record.

The court expressed its concern that Vijayendran's typewritten notes were prepared from her memory, three months after the conversation with Jane I, and Vijayendran was unsure whether she had had her handwritten notes to refer to at the time she typed her notes. The court noted the fact that Vijayendran prepared the report "basically . . . to justify her conduct because of her actions"; this caused the court to question the reliability of the typewritten notes.

Madden pointed out that during her own trial, Vijayendran confirmed that Jane I described a bottle as gooey. Again, the court expressed its concern that Vijayendran's typewritten report was prepared from her recollections of the conversation that happened three months earlier. Ultimately, the court denied counsel's request to read Vijayendran's redacted typewritten notes into the record or allow them to be introduced into evidence as an exhibit.[12]

Appellant contends that the typewritten notes were admissible under Evidence Code section 1237 and that the court erred in excluding the notes.

We review the trial court's decision to exclude the evidence under the abuse of discretion standard. (*People v. Hamilton* (2009) 45 Cal.4th 863, 913, 930-931.)

Evidence Code section 1237 provides, in relevant part: "(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself . . . ; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement."

However, as the California Supreme Court has explained, " 'whether an adequate foundation for admission' of a statement under Evidence Code section 1237 has been established turns on whether the declarant's 'testimony that [the] statement was true was

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12 We note that the typewritten notes could not be introduced into evidence as an exhibit. (Evid. Code §1237, subd. (b)).

reliable,' and the trial court who hears the declarant's testimony has 'the best opportunity' to assess its credibility. [Citation.]" (*Cowan, supra*, 50 Cal.4th at p. 467.)

Evidence Code section 1237 provides a hearsay exception for what is usually referred to as past recollection recorded.

Even if we were inclined to find that the exclusion of the evidence contained in the typewritten notes was an abuse of discretion, the error was not so prejudicial as to constitute a miscarriage of justice. (Evid. Code, § 354 [a verdict shall not be set aside, nor shall the judgment be reversed, by reason of the erroneous exclusion of evidence unless the court that passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice].)

First, the reference to a bottle in Vijayendran's typewritten notes purported to describe a statement that Jane I made, rather than a statement that Vijayendran made. Even if the notes had been read into the record, Jane I's statement would not be admissible for the truth of the matter asserted—i.e., that the object in her mouth was actually a bottle. (Evid. Code, § 1200 [hearsay evidence is evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated. Hearsay evidence is inadmissible unless an exception applies].)

Furthermore, again appellant overstates the importance of Jane I describing what was in her mouth as a bottle. The jury knew that Jane I was blindfolded when the conduct she described occurred. They could reasonably infer that even if she used the term "bottle" to describe what she could not see, the conduct she described would be more consistent with sexual activity than with appellant sticking a bottle in her mouth. This is so because as a young child she would be likely to assume it was a bottle. Her age and experience would not have led her to believe it could have been something else.

In sum, we find no prejudice under any standard of review in the trial court's preventing Vijayendran's typewritten notes from being read into the record.

III. *Pork Rinds*

Jane II was the first child witness for the prosecution. She testified that while she was blindfolded, appellant put a big, curvy thing in her mouth, but she did not know what it was. She agreed with Madden that "it was kind of hard, but kind of soft"; however, she could not really describe it. She agreed that no liquid ever came out of it. Jane II did remember that appellant gave her crackers to taste while they were alone together. She said she did not like the taste and so she spat them out, but she could not remember what the taste was like. While cross-examining Jane II, Madden attempted to introduce into evidence "a bag containing maybe a half a dozen chips." The prosecutor objected and the parties had a conference at the bench, after which counsel moved to a different subject.

Later the court made a record of why it had excluded from evidence Madden's proffered item that was contained in a clear plastic bag. The court stated that it was excluding the evidence pursuant to Evidence Code section 352. Madden made the following offer of proof: "The items within the exhibit consist of pork rinds, a chip-type snack. I believe the Court indicated in its ruling that it was ruled against me on 352 grounds. I will indicate to start that this witness is describing objects physically consistent with those; that they are similar length, they are certainly curvy, they have certainly a roundness to them. [¶] I will also indicate to the Court that Mr. Chandler had a—this is in terms of my good faith, Mr. Chandler was interviewed by Det. Pierce for several hours on the evening of the 9th and specifically mentioned pork rinds. He also mentioned crackers and also mentioned another type of candy. Officer Pierce the next day re-interviewed [Jane II] and asked about all of those items. [¶] Mr. Chandler had told Det. Pierce the evening before that he gave her pork rinds, but she didn't get it. She guessed beef jerky. And that the next day, apparently with that information, Det. Pierce re-interviewed [Jane II], went through all of those things, and she confirmed two of the three, but she didn't confirm beef jerky. But of course it wasn't beef jerky. [¶] What I'm saying is that I, in good faith, believe that these items are the items—the item that

was put in her mouth when she was alone with Mr. Chandler, and that she should be allowed to look at it, to hold the outside of the bag. I will not ask her to put it in her mouth and taste it. I would ask her questions such as, has she ever had something like this. I had never tasted a pork rind until this case. I know what they taste like now. Many people are quite fond of them. It's my understanding that Mr. Chandler has been eating rinds since he was a little boy. They were offered in his class. I think there is plenty of relevance to this. I'm at a loss as to why the probative value is outweighed by the prejudicial effect. If she even recognizes it and she says it's consistent or not."

The prosecutor objected. The prosecutor pointed out that Jane II was asked to describe the object in her mouth, she did so as best she could, and she said she never saw the object. The court reaffirmed its earlier ruling excluding this evidence. The court stated that in its opinion, "the relevance . . . would only apply in this particular situation if she [were] allowed to put that particular food item in her mouth." The court stated that it was not going to require that Jane II do that with the pork rinds or any other item.

Appellant argues that the court's exclusion of the pork rinds evidence unfairly limited his counsel's ability to effectively cross-examine Jane II, in violation of his Sixth and Fourteenth Amendments confrontation rights. We are not persuaded.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The court has broad discretion to balance the probative value of the evidence against its prejudicial effect, and its decision will not be reversed absent an abuse of discretion. (*People v. Lewis* (2001) 26 Cal.4th 334, 374-375.) Furthermore, "[o]nly relevant evidence is admissible [citations], and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence 'having any tendency in

reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' The test of relevance is whether the evidence tends ' "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence. [Citation.]" (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.)

"A defendant's rights to due process and to present a defense do not include a right to present to the jury a speculative, factually unfounded inference." (*People v. Mincey* (1992) 2 Cal.4th 408, 442.)

The court's ruling on demonstrative evidence is reviewable under the abuse of discretion standard. (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1388.)

Given that there was absolutely no evidence that Jane II had seen what it was that appellant put into her mouth, and no evidence that Jane II had handled what it was that appellant put in her mouth, producing a bag of pork rinds and asking her to feel the pork rinds and determine if she had ever had something similar put in her mouth would have produced nothing more than a speculative inference and was therefore irrelevant. Evidence that leads only to speculative inferences is irrelevant. (*People v. Morrison* (2004) 34 Cal.4th 698, 711.) Since counsel stated he had no intention of asking Jane II to taste a pork rind, the court could reasonably conclude that the probative value of showing her a pork rind and asking her to feel one with her hand would reveal nothing more than a speculative inference.

As noted, " ' "[t]he trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence." ' " (*People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167.)

In sum, the trial court did not err in preventing Madden from producing a bag of pork rinds to show to Jane II and have her feel them with her hand.

Hilda Keller's Testimony

Appellant contends that the court erred in allowing Hilda Keller to testify about a conversation she had had with appellant for the purpose of showing his intent with respect to the touching of Jane IV in count 3. The court held an in limine hearing in connection with the defense objection to the prosecutor's request to admit evidence that appellant asked teacher Hilda Keller if he could massage her feet and take a photograph of her feet.

Madden based his objection on the premise that appellant's evident sexual interest in Keller was entirely irrelevant to a charge involving a defendant's apparent sexual interest in a child's body parts. The prosecutor countered by noting that she was not seeking to introduce the evidence under Evidence Code section 1108; rather, she argued, it was admissible under Evidence Code section 1101, subdivision (b) to prove intent, i.e., as probative of appellant's intentions "when he sees a foot."

The court ruled that the evidence of the request to massage the feet and take a photograph was probative because feet are unique body parts. As noted, Keller testified before the jury that appellant entered her classroom and asked to photograph her feet and give her a foot massage because he was taking a massage therapy class. Keller thought that appellant's request was sexually motivated.

Appellant contends that the court abused its discretion in allowing the evidence to be admitted.

Under Evidence Code section 1101, evidence of uncharged conduct is inadmissible to prove the criminal disposition of a defendant. However, such evidence *is* admissible to prove some relevant fact such as identity or common design, plan, or scheme. The admission of uncharged conduct lies within the trial court's discretion. The trial court must weigh the probative value of the evidence against its prejudicial effect. The trial court, in reviewing the admissibility of evidence of other conduct, must consider (1) the materiality of the fact to be proved or disproved, (2) the probative value of the

proffered evidence to prove or disprove the fact, and (3) the existence of any policy or rule requiring exclusion despite relevance. (*People v. Daniels* (1991) 52 Cal.3d 815, 856.) "We review the admission of evidence under Evidence Code section 1101 for an abuse of discretion. [Citation.]" (*People v. Memro* (1995) 11 Cal.4th 786, 864.)

The least degree of similarity between the uncharged act and the charged offense is required in order to prove intent. (*People v. Ewoldt* (l994) 7 Cal.4th 380, 402.) Appellant argues that the evidence that he offered to massage and photograph the feet of an adult woman was not sufficiently similar to evidence that he touched the "stockinged" feet of a second-grade child.

Appellant compares this case to two cases from this court, *People v. Jandres* (2014) 226 Cal.App.4th 340 (*Jandres*) and *People v. Earle* (2009) 172 Cal.App.4th 372 (*Earle*) to argue that this court should conclude that evidence of his apparent interest in Keller's feet was insufficiently similar to the alleged conduct with Jane IV to be admissible under Evidence Code section 1101, subdivision (b).

In *Jandres*, this court ruled that it was improper to admit prior act evidence involving a defendant who kidnapped an 11-year-old girl and put his finger in her mouth, in the defendant's trial on charges he forcibly raped an 18-year-old woman. (*Jandres*, *supra*, 226 Cal.App.4th at pp. 355-357.) In *Earle*, this court concluded that the defendant was entitled to severance of charges of indecent exposure and assault with intent to commit rape. (*Earle*, *supra*, 172 Cal.App.4th at pp. 378-379.) In *Earle*, we addressed whether evidence of the indecent exposure charge was cross-admissible to show the defendant's propensity to commit the sexual assault charge under Evidence Code section 1108. We answered that question in the negative. (*Earle*, *supra*, at pp. 396-400.) We stated: "Does the commission of indecent exposure rationally support an inference that the perpetrator has a propensity or predisposition to commit rape? Not without some kind of expert testimony, it does not." (*Id.* at p. 398.) We determined that for a prior offense to be relevant, the jury must have evidence before it that the prior offense has

"some tendency in reason to show that the defendant is predisposed to engage in conduct *of the type charged.*" (*Id.* at p. 397.)

Appellant's reliance on *Jandres* and *Earle* is misplaced. The similarity between the uncharged and charged conduct here was far greater than in *Jandres* and *Earle*. Jane IV's testimony was that appellant touched her feet with something. Keller's testimony was that appellant wanted to massage (i.e., touch) her feet and photograph them. As the trial court found, "the feet are a unique body part." Furthermore, the evidence in *Jandres* was admitted under Evidence Code section 1108,[13] which allows evidence of other acts to prove a disposition or propensity to commit the charged crime or crimes. (*Jandres, supra,* 226 Cal.App.4th at pp. 352-353.) In *Jandres*, we found it questionable whether kidnapping and placing a finger in a child's mouth was a sexual offense at all. (*Id*. at p. 354.)

The evidence in this case was admitted under Evidence Code section 1101 only to prove appellant's intent in touching Jane IV's feet. Here the degree of similarity between what appellant did to Jane IV and what he wanted to do to Keller is much more significant. Furthermore, there is one other similarity. Both events took place when appellant was alone in a classroom with Jane IV and with Keller. Given the uniqueness of someone's wanting to touch another person's feet, there are sufficient similarities to render appellant's conduct with Keller probative of his intent with Jane IV.

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13 Evidence Code section 1101 prohibits the admission of character evidence, including evidence of specific instances of conduct, to prove a defendant's conduct on another occasion. (§ 1101, subd. (a); *People v. Falsetta* (1999) 21 Cal.4th 903, 913 (*Falsetta*).) Evidence Code section 1108, subdivision (a), provides in pertinent part, "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Evidence Code section 1108 expands "the admissibility of disposition or propensity evidence in sex offense cases." (*Falsetta, supra,* at p. 911.)

The trial court's admission of Keller's evidence was well within its broad discretion, which " 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.) Appellant has failed to make such a showing.

In his Supplemental Opening Brief, appellant argues that the admission of the evidence violated his federal constitutional rights to due process and a fair trial. The argument is based on the assumption that the evidence was improperly admitted, and there was no legitimate inference the jury could draw from it. Since we have found that the evidence was properly admitted, there is no error on which to base appellant's constitutional claim. (*Roybal*, *supra*, 19 Cal.4th at p. 506, fn. 2.)

Cumulative Error

Appellant concedes that some of the evidentiary errors claimed here—for example exclusion of the bag of pork rinds, evidence regarding his offer to massage Keller's feet, and exclusion of Vijayendran's typewritten notes—by themselves might not have adversely affected the outcome of his trial; nevertheless, he claims his due process rights were violated because the cumulative effect of the trial court's and his counsel's errors were sufficiently prejudicial to violate the Fifth and Fourteenth Amendment guarantees of fundamental fairness. We disagree.

"The concept of finding prejudice in cumulative effect, of course, is not new. Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial. [Citations.]" (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.)

Certainly, " '[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) However, as discussed *ante*, since we have found none of appellant's claims of error meritorious

and/or prejudicial, a cumulative error argument cannot be sustained. No serious errors occurred, which, whether viewed individually or in combination, could possibly have affected the jury's verdicts. (*People v. Martinez* (2003) 31 Cal.4th 673, 704; *People v. Valdez* (2004) 32 Cal.4th 73, 128.) Simply put, since we have found no substantial error in any respect, appellant's claim of cumulative prejudicial error must be rejected. (*People v. Butler* (2009) 46 Cal.4th 847, 885.) Appellant was entitled to a fair trial, not a perfect one. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057.)

Errors in the Abstract of Judgment

The court sentenced appellant to five consecutive terms of 15 years to life pursuant to section 667.61, subdivisions (b) and (e).

Appellant points out that there is an error in the abstract of judgment because it lists the sentencing provisions of section 667.61 under item 2 as an enhancement rather than in the appropriate box under item 8. The People concede that a one-strike sentence is an alternative sentence rather than an enhancement. We agree. Section 667.61 also known as the " 'One Strike' " law (*People v. Mancebo* (2002) 27 Cal.4th 735, 738) is "an alternative, harsher sentencing scheme for certain" sex crimes. (*Ibid*.) " ' "Unlike an enhancement, which provides for an additional term of imprisonment, [a one strike sentence] sets forth an alternate penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute." ' [Citation.]" (*People v. Perez* (2010) 182 Cal.App.4th 231, 239.) The box in item 8 pertaining to section 667.61 should have been checked. We will order the abstract of judgment amended accordingly.

Disposition

The case is remanded to the lower court to modify the abstract of judgment to strike the references to enhancements and enter "a check mark in box 8 in front of PC 667.61." As so modified, the judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.